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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

NO. 295

CLOVERLEAF BUTTER COMPANY, a Corporation,  
*Petitioner (Claimant-Appellee Below)*

VS.

UNITED STATES OF AMERICA,  
*Respondent (Appellant Below)*

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE FIFTH CIRCUIT

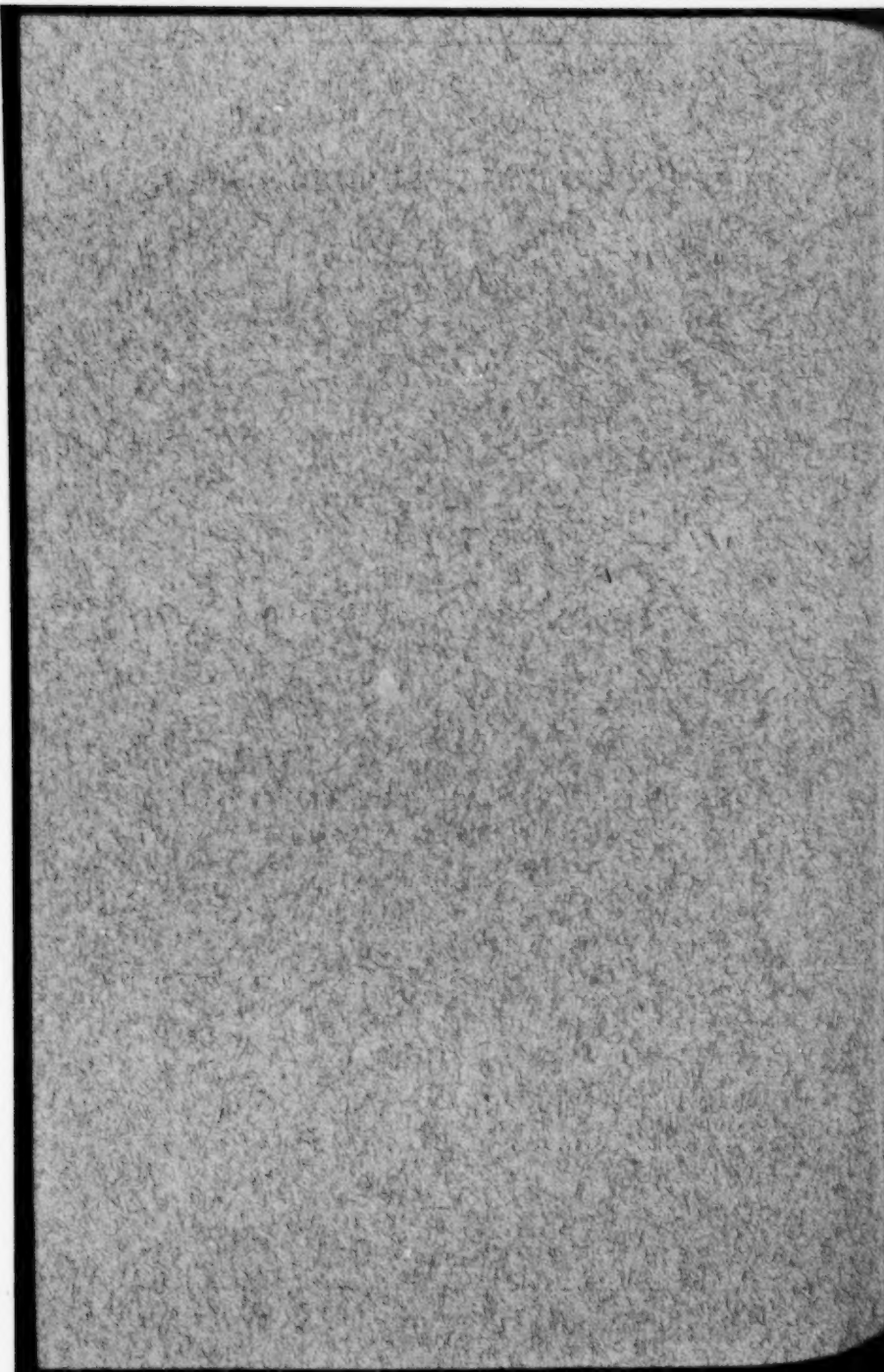
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## SUBJECT INDEX

	<i>Page</i>
Petition for Writ of Certiorari.....	1
Summary Statement of Matter Involved.....	2
Opinion Below.....	7
Jurisdiction .....	8
Questions Presented.....	9
Reasons Relied On For Allowance of Writ.....	10
Specifications of Error.....	13
Prayer For Writ.....	15
Appendix .....	16
Renovated Butter Act.....	16
Internal Revenue Code Secs. 2320 et seq.....	16
Regulations For Carrying Renovated Butter Act into Effect .....	24

## TABLE OF CASES CITED

Anderson vs. Pacific Coast S. & S. Co. 225 U. S. 187.....	13
Andersen & Company vs. U. S. (CCA 9th Cir.) 284 Fed. 542 .....	12
Cloverleaf Butter Co. vs. Patterson, 315 U. S. 148.....	7
Crow Dog, Ex Parte 109 U. S. 556.....	13
Leavenworth L. G. & R. Co. vs. U. S. 92 U. S. 733.....	13
Louisville Underwriters Co. In re: 134 U. S. 488.....	13
Missouri K. & T. R. R. Co. vs. U. S. 92 U. S. 760.....	13
Rodgers vs. U. S. 185 U. S. 83.....	13
Sorrels vs. U. S., 287 U. S. 435, 53 Sup. Ct. 211.....	13
Townsend vs. Little, 109 U. S. 504.....	12
United States, Ex Parte (CCA 5th Cir.) 140 Fed. (2) 19.....	5
United States, Ex Parte 226 U. S. 420.....	13
U. S. vs. 1851 Cartons Frozen Whiting (CCA 10th Cir.) 146 Fed. (2) 760.....	12
U. S. vs. 200 Cases Adulterated Tomato Catsup 211 Fed. 780 .....	12
U. S. vs. Krum, 269 Fed. 848.....	12
U. S. vs. 52 Drums Maple Syrup (CCA 2nd Cir.) 110 Fed. (2) 914.....	12
U. S. vs. Dotterweich 320 U. S. 277.....	12
Washington vs. Miller, 235 U. S. 422.....	13

## STATUTES CITED

Renovated Butter Act I. R. C. Secs. 2320 et seq.....	2
Renovated Butter Act May 9, 1902, Chap. 784, Sec. 5.....	3-6
32 Stat. at Large 196, Amended-Act August 10, 1912 .....	3
37 Stat. 273, making applicable Meat Inspection Laws applicable to Process or Renovated Butter.....	6
Federal Food Drug & Cosmetic Act (June 25, 1938, Chap. 675 Sec. 1) 52 Stat 1040—21 U. S. C. Sec. 301-392 .....	11
Judicial Code Sec. 240.....	8
U. S. C. Title 28, p. 347.....	9



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TO THE HONORABLE SUPREME COURT OF  
THE UNITED STATES:

Your petitioner, Cloverleaf Butter Company, a corporation organized under the laws of the State of Alabama, respectfully prays that a writ of certiorari issue out of this Honorable Court to review the final decree of the United States Circuit Court of Appeals for the Fifth Circuit, rendered in the cause of United States of America vs 24 Cans containing a total of approximately 1,833 pounds of butter, in possession of Cloverleaf Butter Company, Birmingham, Alabama, and numbered 11040 in said Court, on to-wit, the 5th day of May, 1945, whereby the said Circuit Court of Appeals overruled petitioner's application for a rehearing of the order, judgment or decree rendered by said Circuit Court of Appeals on the 27th day of March, 1945, wherein said Circuit Court of Appeals reversed and remanded with directions the judgment and decree of the District Court of the United States for the Southern Divi-

sion of the Northern District of Alabama, dismissing certain libels instituted by said appellant against certain packing stock butter which was in the possession of and claimed by your petitioner, the opinion of said Circuit Court of Appeals being reported in 148 Fed. 2d 365. And in support of its petition for writ of certiorari, your petitioner respectfully shows:

### I.

#### SUMMARY STATEMENT OF THE MATTER INVOLVED.

The petitioner is engaged under Federal license, duly issued in pursuance of the provisions of the Renovated Butter Act (I. R. C. Secs. 2320 et seq.), and has been so engaged for more than 20 years, in the manufacture of renovated butter for sale and shipment in both interstate and intrastate commerce at its plant in Birmingham, Alabama.

The manufacture and distribution of process or renovated butter is a substantial industry, whose wholesome and successful functioning touches farm producers and city consumers. Science has made possible the utilization of vast quantities of country butter, not then suitable for use as food, but after processing, subject to the regulation and inspection of the Secretary of Agriculture, the resulting commodity is free of ingredients deleterious to health.

Country butter—known to the trade as packing stock butter—is bought by petitioner from farmers, country stores, and rolling stores, in the States of Virginia, North Carolina, South Carolina, Georgia, Tennessee and Alabama, and concentrated at petitioner's plant in the City of Birmingham, solely as the basic raw material to be used in the manufacture of renovated butter.

Renovated butter is defined in Internal Revenue Code, Sec. 2320 (c), and is manufactured by melting the packing stock butter, extracting the butter oil, and then thoroughly

washing, straining, cleansing, pasteurizing, clarifying and refining the extracted oil and mixing the same with a pasteurized milk product and rechurning it in petitioner's plant, which said plant is equipped with the most improved appliances well-adapted to remove all impurities, and uses only the most sanitary methods known to the business.

During the time that petitioner has been so engaged in the manufacture and sale of process or renovated butter, and until the interference complained of, the United States Secretary of Agriculture, pursuant to the special Renovated Butter Act and the regulations promulgated thereunder, through the Bureau of Dairy Industry, has exercised exclusive control and supervision of the manufacture of renovated butter, and of the materials going into the manufacture of the same, as required by the said Renovated Butter Act. See Act May 9th, 1902, Chap. 784, Sec. 5, 32 Stat. at Large 196, Internal Revenue Code, Sec. 2325, which provides:

"The Secretary of Agriculture is authorized and required to cause a rigid sanitary inspection to be made at such times as he may deem proper or necessary, of all factories, and storehouses where process or renovated butter is manufactured, packed or prepared for market, and of the products thereof and materials going into the manufacture of the same. \* \* \* \* \* And he shall also have the power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into the States or in course of exportation in shipment he shall have power to confiscate the same."

Beginning July 1st, 1940, through October 24th, 1940, the United States District Attorney for the Northern Dis-

trict of Alabama, at the instance of the Federal Security Agency, or the Administrator, in the attempted application to this industry of the Federal Food, Drug and Cosmetic Act, (June 25th, 1938, Chap. 675, Sec. 1, 52 Stat. at Large 1040, 21 U. S. C. A. Appendix, Secs. 301 et seq.), and not by the authority of the United States Secretary of Agriculture, instituted in the District Court of the United States five separate libels of packing stock butter in the possession of your petitioner, which material had not been purchased, transported or held by it for sale as a food in its then condition, but had been acquired for the sole purpose of using the same, or such parts thereof, as upon inspection by it and the authorized agents of the Secretary of Agriculture, might be found suitable therefor, for the manufacture of process or renovated butter. (For said libels see Rec. p. 1 to 13, inc.)

Petitioner claimed the material, denied the adulteration, and prayed for a definite statement or bill of particulars as to what sort of matter was intended to be relied upon as constituting the adulteration; and as to whether all of the containers seized were claimed to be adulterated; and if not, which ones? No ruling was had on the motion, no bill of particulars furnished claimant, nor any more definite statement made. In February 1942, the cases were consolidated for trial. On October 4th, 1943, an order was made by the District Judge that the Marshal deliver the butter to the claimant for renovation, the identity of the several lots to be preserved and the custody of the Court to be maintained, and provision being made for the taking of samples by both sides before and after renovation, all at the expense of claimant; jurisdiction was retained to dispose of the butter afterwards as if the order had not been granted. (Rec. p. 40.) The United States petitioned the Circuit Court of Appeals for a writ of mandamus to compel the District Judge to vacate the order as being without



authority of law and to set a date certain for the trial of the case.

The majority of the Circuit Court of Appeals, (Waller, Circuit Judge, dissenting), held in effect, that the order was unauthorized prior to a decree of condemnation, and that the District Judge should rule on the motion for a more definite statement and bring the matter to a final trial. (See *In re: United States*, C.C.A. 5th Circuit, 140 Fed. 2d 19).

After the ruling of the Circuit Court of Appeals on the petition for mandamus, the District Attorney filed what is termed an amendment to the complaint, (shown by Rec. p. 55), which did not meet the demand for the bill of particulars.

On January 13th, 1944, the petitioner answered the libels, setting up its claim to the seized articles, denying all allegations, conclusions and arguments therein to the effect that the said butter was or is adulterated as alleged, and further alleging that the claimant was a manufacturer of process or renovated butter under Federal license pursuant to the Renovated Butter Act, and had been so engaged for a period of 20 years at the time when the respective lots of butter involved were caused to be libelled by the Federal Security Agency; and that said butter was acquired, transported and held solely for the purpose of utilizing the same, or such part thereof as might be suitable, for the manufacture of process or renovated butter in the usual course of its business in conformity to the Renovated Butter Act and the regulations promulgated by the Secretary of Agriculture of the United States, and under inspection of such raw materials and the finished product as the Secretary of Agriculture might cause to be made; and that the same was not acquired, transported, or held as food in its then condition, but only for use as such raw material; that under the provisions of the Renovated Butter Act the

United States Secretary of Agriculture had the power and it was his duty to ascertain whether or not materials used in the manufacture of such process or renovated butter were or would be deleterious to health, or unwholesome in the finished product; and that the libel or complaint was caused to be filed and the proceedings in each of said cases instituted and prosecuted solely at the instance and by authority of the Federal Security Agency, or the Administrator, and not at the instance or by authority of the Secretary of Agriculture; and that the Court had no jurisdiction or authority to condemn said raw material under the Federal Food, Drug and Cosmetic act. (Rec. p. 58.)

On June 27th, 1944, petitioner filed its verified motion to dismiss the libels, setting up substantially the same grounds as contained in its answer. (Rec. p. 63.)

After hearing the motion the District Court on March 24th, 1944, entered an order that said libels in the respective cases be dismissed and that the butter seized be delivered to the claimant. (Rec. p. 66.)

The United States appealed to the Circuit Court of Appeals for the Fifth Circuit, which court reversed the District Court on March 27th, 1945. Thereafter, within due time, petitioner filed a motion for a rehearing which said motion was overruled and denied by said court on May 5th, 1945. (Rec. pp. 87 to 95.)

It is the contention of the petitioner, which was upheld by the District Court that the regulation of the manufacture of process or renovated butter, and the materials entering into the same, is controlled by the special Act of Congress herein referred to as the Renovated Butter Act, approved May 9th, 1902, 32 Stat. 193-197, which Act was amended by the Act approved August 10th, 1912, entitled "An act for making appropriations for the Department of Agriculture for the fiscal year ending June 30th, 1919," (37 Stat. 273), making all parts of the Act providing for

inspection of meats for exportation approved August 30th, 1890, Chap. 839, 26 Stat. 414, and of the Act to provide for the inspection of live cattle, hogs, carcasses and products thereof, which are the subject of Interstate Commerce, approved March 3rd, 1891, Chap. 555, 26 Stat. 108-109, and of amendment thereto approved March 2nd, 1895, Chap. 169, Sec. 1, 28 Stat. 732, which are applicable to the subject and purposes discovered in Sec. ~~2327~~<sup>2325</sup>, applicable to process or renovated butter, and that the sanitary provisions for slaughtering, meat canning, or similar establishment, as set forth in the Act of June 30th, 1906, Chap. 3913, 34 Stat. 676, shall be extended to cover renovated butter factories under such regulations as the Secretary of Agriculture may prescribe. (I.R.C. Sec. 2327 (b) (c) ).

The Renovated Butter Act was readopted as Sections 2320-2327 of the Internal Revenue Code, February 10th, 1939.

Pursuant to the authority conferred by the Act the Secretary of Agriculture and the Secretary of the Treasury promulgated comprehensive and detailed regulations pertaining to the manufacture of process or renovated butter, the inspection of the raw material, and of the finished product as well as the sanitary condition of the factories and employees.

The Renovated Butter Act, as now contained in the Internal Revenue Code, and the regulations so promulgated are set out in the appendix hereto.

## II.

### OPINION BELOW

No opinion was rendered by the District Court other than the expression of its opinion that the motion of complainant to dismiss the libel was well taken. (Rec. p. 81).

The opinion of the Circuit Court of Appeals is reported in 148 Fed. 2d 365, wherein that Court, quoting in part from *Cloverleaf Butter Company v. Patterson*, 315 U. S.

148, 62 Sup. Ct. 491, the Federal Food, Drug & Cosmetic Act, held that: "It (petitioner) does, indeed, show that the renovating process is well adapted to remove all impurities, that renovated butter is good butter, that all packing stock has to be renovated, that all of it comes into the plant more or less adulterated with extraneous and deleterious substances in it, or otherwise unfit in its then condition for human food, and that if all packing stock were to be condemned, because of not fit for human food, no matter how slight the adulteration, the renovated food industry could not survive. But these considerations are for Congress, and if Congress had intended to take packing stock butter out of the Food and Drug Act, it could have very easily done so, even by amending the statutory definition of food, to include materials that go into the finished product, or by expressly excluding from the Act renovated butter."

The Congress did not write such a specific exception because it was not necessary. The general law known as the Food, Drug and Cosmetic Act did not repeal nor modify the special law known as the Renovated Butter Act.

Congress was entirely familiar with the rule as declared by the Court below in its opinion as follows:

"Implied repeal or limitation of one Act by another is never favored. It is not for the courts, unless the conflict between the two Acts is inescapable and compelling, to exclude from the coverage of an Act matters which its terms expressly include, on the theory that another Act whose general purpose seems inconsistent, has impliedly repealed or limited the Act under review. Only where it is found that it is not possible for both to co-exist can one Act be held to repeal or limit another, and then only with respect to the precise point of conflict."

### III.

#### JURISDICTION.

The jurisdiction of this Honorable Court is invoked under Section 240 of the Judicial Code as amended by Act

of February 13th, 1925, Chap. 229, Sec. 1, 43 Stat. 938, Sub. Secs. (a) and (b), separately and severally of United States Code, Title 28, Sec 347 (U.S.C.A. Sec 347), and Rule 38 of the revised Rules of the Supreme Court of the United States, adopted February 13th, 1939, Amended March 25, 1940, October 21st, 1941, and May 26, 1941.

#### IV.

#### QUESTIONS PRESENTED

The questions are:

- (1) Did the Congress by the adoption of the general act known as the Food, Drug and Cosmetics Act of 1938 intend to repeal, limit or modify the special act known as the Renovated Butter Act passed in 1902, amended in 1912, substantially reenacted in the Revenue Code of 1939—about one year after passage of the Food, Drug and Cosmetics Act in 1939?
- (2) Did Congress by the passage of the general law known as the Food, Drug and Cosmetic Act of 1938 intend to strip the Secretary of Agriculture of his power given him under and by virtue of the special Renovated Butter Act of 1902—under which the Secretary had promulgated detailed regulations from time to time governing and controlling the industry, and under which he had exercised the exclusive control of the manufacture of process or renovated butter and supervision of same for almost a half century?
- (3) Did the Congress by the passage of the general law known as the Food, Drug and Cosmetic Act of 1938 intend to delegate powers theretofore committed to the Secretary of Agriculture to another, separate and independent governmental agency or bureau relating to the duties as to inspection of raw materials to be used in the manufacture of renovated or process butter, or to give such other agency power to seize such raw material while in the process of manufacture or held for that sole purpose before the Secretary of Agriculture had an opportunity to inspect same as

well as after the Secretary had made such inspection and had passed or approved such raw material as suitable to be renovated?

(4) Did the Congress intend by the adoption of the Food, Drug and Cosmetic Act of 1938 to change the tests of suitability of raw material to be used in the manufacture of process butter; or to say that such raw material was a "component part" of the finished product, notwithstanding the part that enters renovated butter is not the packing stock but only the clarified, cleansed, melted and pasteurized oil extracted from such packing stock, or to provide that such raw material or packing stock if in "whole or in part" was affected with the slightest contamination or unsuitability for food in its then condition must be condemned by the Security Administrator; and the manufacture of process butter from such material be prohibited, or the right to process the same be denied, even though such manufacture or processing was done under the eye of the Secretary of Agriculture?

## V.

### REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

That the matter presented is of vital importance to the process or renovated butter industry, the producers of the raw materials, and the consuming public.

Under the construction of the Renovated Butter Act and the Federal Food, Drug and Cosmetic Act, as made by the Circuit Court of Appeals, the process or renovated butter industry cannot survive.

Under the Renovated Butter Act and the regulations promulgated in pursuance thereof, the Secretary of Agriculture is authorized and required to make a rigid sanitary inspection of all factories where process or renovated butter is manufactured, packed or prepared for market, and of the products thereof and the materials going into

the manufacture of the same; and is authorized to make all needful regulations for carrying the law into effect; he has power to ascertain whether or not materials used in the manufacture of process or renovated butter are deleterious to health or unwholesome in the finished product, and in case deleterious or unwholesome materials are found to be used in product intended for exportation or interstate shipment, or in the course of exportation or interstate shipment, he has power to confiscate the same.

The test under that Act of the suitability of the raw material is the wholesomeness or freedom from substances deleterious to health of the finished product.

Whereas, under the Federal Food, Drug and Cosmetic Act, (June 25th, 1938, Chap. 675), the term "food" means: (1) articles used for food or drink for man or other animals, (2) chewing gum, (3) articles used for components of any such article. (U.S.C.A. Title 21, Sec. 321, Appendix). A food shall be deemed to be adulterated \* \* \*

(4) if it consists in whole or in part of any filthy, or decomposed substances, or if it is otherwise unfit for food.

(U.S.C.A. Title 21, Sec. 342 (a)). Any article of food that is adulterated or misbranded, when introduced into or while in interstate commerce, shall be liable to be proceeded against, while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found. (U.S.C.A. Title 21, Sec. 334 (a)).

Any food condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct; provided that after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond, the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with



the provisions of this chapter under the supervision of an officer or employee duly designated by the Administrator, and the expenses of such supervision shall be paid by the person obtaining release of the article under bond. (U. S. C. A. Title 21, Sec. 334 (d)). The introduction or delivery for introduction into interstate commerce of any food, that is adulterated or misbranded is prohibited. (U.S.C.A. Title 21, Sec. 331). Any person violating any of the provisions of Section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both such imprisonment and fine; and for conviction of subsequent violation may be imprisoned for not more than three years. (U.S.C.A. Title 21, Sec. 333—U. S. v. Dotterweich, 320 U.S. 277; 64 S. Ct. 134.)

The Federal Food, Drug and Cosmetic Act has been construed by a majority of decisions as prohibiting the interstate shipment of food which consists in whole or in part of any filthy, putrid or decomposed substance, irrespective of whether it was injurious to health. (United States vs. 1851 Cartons Frozen Whiting, labelled in part, "H. & G. Farms, Whiting Frozen Fish; C.C.A. 10th Circuit, 146 Fed. 760; Anderson vs. United States, C.C.A. 9th Circuit, 284 Fed. 542; United States vs. 200 Cases Adulterated Tomato Ketchup, 211 Fed. 780; and United States v. Krumm, 269 Fed. 848; United States v. 200 Cases, more or less, of Canned Salmon, 289 Fed. 157.)

The Act is further construed as not recognizing any intended processing or cleansing of raw material, component parts of food, and the intention to process the product so as to make it pure before it reached the public is declared immaterial. United States v. 52 Drums, Maple Syrup, C.C.A. 2nd Circuit, 110 Fed. 2d 914. Processing prior to order of condemnation, even for the purpose of



determining whether or not the product is adulterated, is unauthorized. In re: United States, C.C.A. 5th Circuit, 140 Fed. 2d 19.

1. That the Circuit Court of Appeals for the Fifth Circuit has decided an important question of Federal law with respect to the applicability of the Federal Food, Drug and Cosmetic Act to the raw material — packing stock butter—transported and held by a manufacturer for the sole and exclusive purpose of manufacturing same into process or renovated butter under the provisions of the Renovated Butter Act and regulations promulgated thereunder which has not been but should be settled by this court.

2. That the Circuit Court of Appeals for the Fifth Circuit has decided a Federal question in a way probably in conflict with applicable decisions of this Court with respect to construction of statutes as declared in many cases among which are, *Sorrells v. United States*, 287 U.S. 435, 53 S. Ct. 214; *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 32 S. Ct. 626; *Leavenworth L. G. & R. Co. vs. U. S.*, 92 U.S. 733; *Missouri K. & T. R.R. Co. v. U. S.*, 92 U.S. 760; In re *Louisville Underwriters*, 134 U.S. 488, 10 S. Ct. 587; *Rogers v. U. S.*, 185 U.S. 83, 32 S. Ct. 582; *Ex Parte United States*, 226 U.S. 420; *Washington v. Miller*, 235 U.S. 422; *Ex Parte Crow Dog*, 109 U.S. 556; *Townsend v. Little*, 109 U.S. 504.

3. That the Circuit Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision.

## VI.

### SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred—

1. In reversing the decree of the United States District Court for the Northern District of Alabama.

2. In holding, in effect, that the Renovated Butter Act

with its tests, standards and procedure was not the controlling statute in the case.

3. In holding, in effect, that packing stock butter, not transported or held by a manufacturer of process or renovated butter for sale in its then condition, but merely as raw material to be prepared and processed under the Renovated Butter Act and regulations promulgated thereunder, and the inspection, determination and control of the Secretary of Agriculture, was subject to seizure under the Federal Food, Drug and Cosmetic Act.

4. In holding that all that was intended by the Renovated Butter Act was that renovated butter could be made out of stock which, while not in its then state fit for human consumption, was yet not so unfit as to require its condemnation, the Circuit Court of Appeals pretermitted the construction of the Federal Drug, Food and Cosmetic Act by the great majority of the courts that "adulteration" as defined in that Act rendered raw materials subject to seizure and condemnation regardless of the purpose and ability of the manufacturer to remove all impurities before offering for sale in the finished product.

5. The Circuit Court of Appeals erred in holding that Congress, while authorizing the making of renovated butter, left to proper administration the supervision of the ingredients whenever they were of such character as to be deemed deleterious, otherwise unfit for foods, and holding in effect that such administration and supervision should be had under the Federal Food and Drug Act instead of the administration and supervision on the part of the United States Secretary of Agriculture as required by the Renovated Butter Act.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this

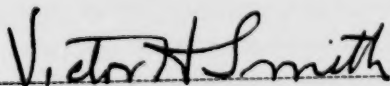
Court a full and complete transcript of the record and of the proceedings of said court had in the case numbered 11040, United States of America, Appellant vs. 24 Cans containing a total of approximately 1833 pounds of ladeled butter in possession of Cloverleaf Butter Company, Birmingham, Alabama, et al, Appellees, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment therein of said United States Circuit Court of Appeals for the Fifth Circuit be reversed by this Court, and for such other relief as to this Court may seem proper. July 28, 1945.

CLOVERLEAF BUTTER COMPANY, *Petitioner*

By \_\_\_\_\_

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